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September 20, 2004

BY HAND DELIVERY

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Federal Election Commission
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RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

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Re: MUR 5506 (EMILY's List, C00193433)

On behalf of EMILY's List and Joseph Solmonese, as Treasurer (collectively, the "Committee"), this letter is submitted in response to the complaint filed by Lori Glasser dated August 2, 2004 (the "Complaint"). The complaint alleges that certain communications made by the Committee were illegal contributions to the campaign of Betty Castor because the communications were coordinated with the campaign. For the reasons set forth below, the Federal Election Commission should find no reason to believe that the Committee violated the Federal Election Campaign Act of 1971, as amended, or the Commission's regulations, and it should dismiss this matter.

I. Facts

A. EMILY's List

EMILY's List was founded in 1985 to elect pro-choice Democratic women to federal, state and local office, and to promote issues of concern to its members and adherents. EMILY's List is committed to recruiting and funding viable women candidates; helping them build and run effective campaign organizations; and mobilizing women voters to help elect progressive candidates across the nation. EMILY's List is registered with the Commission as a non-connected multicandidate political committee.

EMILY's List engages in a variety of activities to support the purposes described above. It frequently solicits contributions from its members for endorsed federal, state and local candidates. It also makes direct contributions to its endorsed

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candidates. These activities are undertaken by designated staff, volunteers and consultants.

Through a nationwide project called "Women Vote!," EMILY's List engages in various forms of general public communications to encourage support for its positions among the public at large. Women Vote! is an initiative that integrates sophisticated research, advanced information technology, and good old-fashioned organizing to get out the female vote for pro-choice Democratic women candidates and the entire Democratic ticket. This project is active in several different states, including Florida – where the project is called "Florida Women Vote!"

Unlike the Committee's general activities of direct candidate support, Women Vote! is undertaken by employees, consultants and volunteers who are barred, as a matter of policy, from interacting with federal candidates, political party committees, or the agents of the foregoing. These employees, volunteers and consultants are also barred from interacting with others within EMILY's List regarding specified candidates or officeholders. EMILY's List implemented and enforces these prohibitions to ensure compliance with the Commission's coordination regulations at 11 C.F.R. Part 109.

B. The Committee's Florida Activities

When the Complaint was filed, Betty Castor was a candidate to be the Democratic nominee to the United States Senate from Florida. She has since won the primary election. Consistent with its general activities of direct candidate support and with the practices described above, the Committee solicited contributions from its members for Castor's campaign. As the Complaint acknowledges, the campaign paid the Committee for the cost of the solicitations.

Through Florida Women Vote!, the Committee also produced and distributed the public communications to which the Complaint refers. These communications were created, developed and distributed completely independently of Betty Castor and her agents, and in conformance with the Committee policies described above. The Committee staff, volunteers and consultants who were involved in the communications discussed them neither with the Castor campaign nor with those within the Committee who had contact with the Castor campaign. The Committee used vendors who were unrelated to the Castor campaign. Those vendors, in turn, acquired information and materials for the communications from public information and sources other than the Castor campaign. For example, the photographs to which

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the Complaint refers were acquired directly from the original photographer – who had retained all rights to the photographs – without any involvement or knowledge on the part of Castor, her campaign or her agents, and only after the Committee contacted the photographer separately. In short, these communications – which, in any event, did not advocate Castor's election – were created without the knowledge or input of the Castor campaign or employees of the Committee with information about the campaign.

II. Legal Analysis

A. Applicable Laws

Federal election law treats coordinated expenditures by a non-connected committee as an in-kind contribution to the candidate or political committee with which they were coordinated. *See* 2 U.S.C. § 441a(a)(7)(B)(i) (2004); 11 C.F.R. § 109.20(b) (2004). The regulations also contain a detailed definition of a "coordinated communication." To meet the definition, communications must meet satisfy at least one of the "content" standards, and at least one of the "conduct" standards. *See id.* § 109.21(a)(2-3).

The central – and indeed only – question posed by the Complaint is whether the communications meet the conduct standards of § 109.21(d). The Complaint presents no specific facts to demonstrate that the conduct standard was met, and the true facts demonstrate that it was not.

B. Alleged Violation

The Complaint alleges that Florida Women Vote!'s television advertisements were coordinated with the Castor campaign with the meaning of § 109.21. This allegation is false. The advertisements were created without the knowledge or input of the Castor campaign, and no material information from the Castor campaign was used to create the advertisements. The specific facts cited by the Complaint in an attempt to show coordination are discussed in more detail below.

1. Overlapping Employees

The Complaint notes that former Committee employees are now employed by the Castor campaign. However, the Complaint presents no facts to suggest that any of these former employees were involved in the Florida Women Vote! communications.

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It simply tries to taint the communications with the fact that they once worked for the Committee, and later worked for Castor.

In fact, section 109.21(d) was crafted to address the *reverse* situation – when a campaign employee or vendor leaves the campaign and brings material information to a third-party spender. *See id.* § 109.21(d)(5). The regulation was crafted to address "Congress' primary concern, which is a situation in which a former employee of a candidate goes to work for a third party." Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 438 (Jan. 3, 2003). The regulations create no presumption of coordination when an employee leaves a third-party payor to be employed by a candidate.

EMILY's List is one of the nation's largest Democratic political organization, and is a frequent source of future campaign staffers for Democratic campaigns. Moreover, EMILY's List aggressively trains young women interested in working on campaigns, and serves as a resource for them as they seek employment. These facts, standing alone – and the Complaint presents no others on the subject – do not signify coordination.

2. Contact Between the Committee and the Castor Campaign

The Complaint also alleges that there have been numerous contacts between the Committee and the Castor campaign, such as between Betty Castor and Martha McKenna.

As discussed above, Committee employees such as Ms. McKenna, who are involved in its general program of candidate support, frequently have contact with candidates and their campaigns; the Castor campaign is no exception. In order to determine whether to support a campaign, Committee staffers spent time assessing the campaign to determine whether the campaign has the organization, funding, staffing, and other resources to conduct a winning campaign. These assessments determine whether and to what extent the Committee will support a particular campaign. None of these employees was involved in or had knowledge of the Committee's independent spending. Further, none were permitted to transmit information about the Castor campaign to those involved in that independent spending.

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Even were this not the case, the fact of contacts between a third-party payor, standing alone, is not sufficient to create an inference of coordination. The Commission's rules require that conduct meets one of the five standards defined in 11 C.F.R. § 109.21(d); of these standards, only three include direct contact between the third-party payor and a campaign. First, coordination may be found when a campaign has made a "request or suggestion" for a communication, or if the campaign "assents to the suggestion." *Id.* § 109.21(d)(1). Second, coordination may be found when a campaign was "materially involved" in decisions regarding the content or distribution of the communication. *Id.* § 109.21(d)(2). Finally, coordination may result from "substantial discussions" between the third-party payor and the campaign, in which information about a candidate's "plans, projects, activities, and needs" is conveyed to the third-party payor and is "material to the creation, production or distribution of the communication." *Id.* § 109.21(d)(3).

No request or suggestion for a communication was received by Florida Women Vote!; the Castor campaign was not materially involved in the communications; and there was no substantial discussions between the campaign and those employees responsible for the independent communications. Thus, the Florida Women Vote! communications were not coordinated with the Castor campaign.

3. Media Buy

Finally, the Complaint argues that because the Castor campaign made changes to its advertising buys after the Committee purchased advertising, the buys must have been coordinated. That allegation is false.

The Committee does not know what led the Castor campaign to purchase its advertising when it did. Nonetheless, broadcast stations must "keep and permit public inspection of a complete and orderly record (political file) of all requests for broadcast time made by or on behalf of a candidate for public office." 47 C.F.R. § 73.1943(a). The records required must be placed in the political file "as soon as possible," which means "immediately." *Id.* § 73.1943(c). Furthermore, there are services that provide information to purchasers.

Once the Committee made its advertising buy, it became a matter of public record, available to anyone, including the Castor campaign.

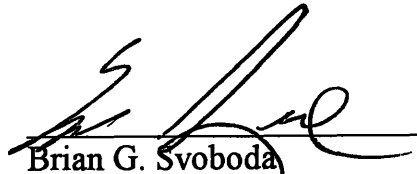
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III. Conclusion

In sum, the Complaint does not allege any facts that, if true, would lead to the conclusion that the Committee's communications were coordinated with the Castor campaign. Accordingly, for the reasons set forth above, the Committee respectfully requests that the complaint against it be dismissed.

Very truly yours,

A handwritten signature in black ink, appearing to read "Brian G. Svoboda", is written over a horizontal line.

Brian G. Svoboda
Ezra W. Reese
Counsel to EMILY's List

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